66709-2

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NO. 66709-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR A. CRUZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglas A. North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Salvador A. Cruz's motion for mistrial after the jury learned a woman who climbed onto the roof of the downtown Seattle King County courthouse was related to Cruz's case.

2. The trial court erred by admitting evidence of alleged child sexual abuse under RCW 10.58.090.

3. The trial court erred by admitting evidence of alleged child sexual abuse under ER 404(b).

4. The trial court's jury instruction pertaining to RCW 10.58.090 was an unconstitutional comment on the evidence.

5. The trial court's jury instruction pertaining to RCW 10.58.090 unfairly misled the jury.

6. RCW 10.58.090 violates State and federal constitutional provisions providing for the separation of powers, protecting against ex post facto legislation, and protecting the due process right to a fair trial.[1]

[1] In State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009) and State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), this Court upheld RCW 10.58.090 against the constitutional challenges discussed in this brief. The Washington Supreme Court granted review, which is pending. To preserve these issues in the event of a change in the law, Cruz raises these constitutional challenges.

7. The trial court erred by admitting evidence under the "child hearsay exception" set forth in RCW 9.94A.120.

8. The trial court exceeded its statutory sentencing authority by ordering Cruz to pay a $100 DNA collection fee.

9. The trial court exceeded its statutory sentencing authority by imposing an improper community custody condition.

Issues Pertaining to Assignments of Error

1. Did the trial court err by denying Cruz's motion for mistrial after the jury learned a woman who climbed onto the roof of the downtown Seattle King County courthouse during Cruz's trial was related to Cruz's case?

2. RCW 10.58.090 permits evidence of prior sex offenses if the court deems the probative value outweighs the danger of unfair prejudice and sets forth seven mandatory factors the court must consider. ER 404(b) permits evidence of other bad acts to show, among other things, they were part of a common scheme or plan with the charged offense.

a. Did the trial court err by failing to consider "[w]hether the probative value is substantially outweighed by the danger of unfair prejudice," as required by RCW 10.58.090(6)(g)?

b. Did the trial court err by finding the uncharged acts were substantially similar to those that gave rise to the charged crimes, as required to find they were part of a common scheme or plan under ER 404(b)?

3. In its instruction pertaining to the evidence admitted under RCW 10.58.090, the trial court used language indicating Cruz in fact committed the uncharged acts. Was the court's instruction an unconstitutional comment on the evidence?

4. Because of the trial court's admission of evidence under RCW 10.58.090, the jury heard testimony that Cruz raped one young girl and molested another. The State had charged Cruz with first degree child rape and first degree molestation, but Cruz pleaded guilty to the lesser offense of communicating with a minor for immoral purposes (CMIP). Jurors were not informed of this fact. Yet the trial court's RCW 10.58.090 instruction referred to the uncharged acts as "sexual assault or child molestation." Was the court's instruction unfairly misleading?

5. Under the separation of powers doctrine, when a statute conflicts with a court rule governing courtroom procedure, the court rule takes precedence. Does RCW 10.58.090 violate the separation of powers doctrine because it directly conflicts with ER 404(b)?

6. A substantive change in the law violates the ex post facto clause when it is applied retroactively to disadvantage the defendant. RCW 10.58.090 permits the State to fill gaps in its proof relating to the crime charged by persuading the trier of fact with evidence of criminal character or propensity. Does RCW 10.58.090 violate State and federal ex post facto provisions because it is a retroactive change in the law that effectively lessens the State's burden of proof?

7. Washington's ex post facto clause was modeled after Oregon's, which has been interpreted as providing greater protection than the federal provision in protecting against changes in the law that one-sidedly give advantage to the State over accused persons. Does Washington's constitution provide similarly greater protection and does RCW 10.58.090 violate Washington's ex post facto clause?

8. Washington's constitutional right to a jury trial encompasses the right as it was understood at the time of adoption. At that time, evidence used to infer guilt based on criminal character or propensity was generally banned as unfair. In permitting such evidence and inference, does RCW 10.58.090 violate Washington's due process right to a fair trial?

9. Did the trial court err by admitting hearsay testimony under the "child hearsay statute," RCW 9A.44.120, without first thoroughly considering the well-established factors for determining admissibility of such testimony.

10. Did the trial court exceed its statutory sentencing authority by ordering Cruz to lay a $100 DNA collection fee when each offense occurred well before the effective date of the DNA collection fee provision?

11. Did the trial court exceed its statutory sentencing authority by imposing a community custody condition that was not reasonably crime-related?

B. STATEMENT OF THE CASE

1. Overview

Based on a series of disclosures made by several young girls in 1997 and 1998, the King County Prosecutor charged Salvador A. Cruz with two counts each of first degree child rape against B.B. and J.C., two counts of third degree child rape against K.O., two counts of first degree child molestation against D.G., and one count of CMIP with O.J. CP 146-

52.[2] The overall charging period was November 1, 1993, to March 1, 1998. Id.

Cruz chose to represent himself at trial, and was aided by standby counsel. CP 34. With the assistance of Spanish language interpreters, Cruz argued all motions and examined each witness. The jury ultimately found Cruz guilty of all remaining charges. CP 194-200.

2. Pretrial hearing – child hearsay

The State moved pretrial for the admission of out-of-court statements made by F.P., A.B. and J.C. under RCW 9.94A.120. CP __ (sub. no. 149, State's Trial Memorandum, at 26-35, filed 10/27/2010); 4RP 84-90.[3] The statements were made to social worker Gail Backer by F.P. and A.B. during sexual assault counseling sessions, Bellevue Police Detective Robert Thompson by all three girls, and Carolyn Strange, with whom J.C. lived for awhile. CP __, sub. no. 149, at 29-31.

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[2] As described in greater detail below, the State dismissed the two counts naming D.G. as the complainant after she climbed outside onto the roof of the downtown Seattle King County courthouse. 8RP 4-7.

[3] The verbatim report of proceedings is cited to as follows: 1RP (6/18, 6/29, 7/7, 7/29, 8/26, 9/10, 9/17, 9/24, 10/1, 10/28, 11/1, 11/2, 12/1, 12/2, 12/6, 12/7, 12/8, 1/21/2011); 2RP (10/8, 10/22, 1/14/2011, 2/16/2011); 3RP (10/25); 4RP (10/26); 5RP (10/27); 6RP (11/3); 7RP (11/4); 8RP (11/8); 9RP (11/9); 10RP (11/10); 11RP (11/15); 12RP (11/16); 13RP (11/17); 14RP (11/18); 15RP (11/19, 11/22); 16RP (11/29); 17RP (11/30).

Both Backer and Thompson testified during a pretrial hearing. 4RP 26. F.P. told Backer that Cruz often touched her "private" and "boobies" underneath her clothes, had her touch his "private," and sometimes put his "private" in her "butt." 4RP 19-20, 32. These events usually occurred in the garage of her family's residence, when she was seven and eight years old. 4RP 19-21, 26. After the first improper touching incident, Cruz told F.P. he would kill her if she ever reported the abuse. 4RP 20.

A.B. told Backer that Cruz touched her "private" one time on the outside of her clothing. 4RP 24, 35.

Thompson testified he met with F.P. and A.B. at their home. 4RP 51-52. As she had told Backer, F.P. disclosed that Thompson touched her vaginal area and "boobies" under her clothes, inserted his finger into her vagina, and "put his private in her back private . . . ." 4RP 53-57, 61-62. The incidents happened "lots and lots of times." 4RP 62.

A.B. disclosed to Thompson that Cruz touched vaginal area outside her underwear. 4RP 58.

Thompson later interviewed nine-year-old J.C. at Strange's home after he learned Cruz lived with the child. 4RP 63-64, 82-84. J.C. said

Cruz touched her in a bad way. 4RP 65. Thompson ended the interview because it was clear J.C. did not want to speak with him. 4RP 65.

The trial court found the hearsay testimony admissible under RCW 9.94A.120 because F.P. and A.B. made consistent statements to both Backer and Thompson and there was no indication any of the three girls has problems telling the truth or had a motive to lie. 4RP 92-93.

3. Trial -- Residence history

Cruz and Veronica Cabral lived together with Cabral's daughters, J.C. and D.G., at a Redmond YMCA apartment beginning in November 1993. 1RP 541-43. They stayed there 18 months. 1RP 545.

During their stay at the YMCA, they befriended a neighbor, Beverly Pennington, who had two daughters, F.P. and A.B., as well as a young son. 1RP 546. The girls played together at both Cabral's and Pennington's apartments. 1RP 546-47. Cabral had no concerns about Cruz being around her daughters at bedtime, trusted him with them, and left him alone with them. 1RP 547-48.

After their respective stays at the YMCA, Cabral and her family moved into a Redmond apartment and Pennington into a house in Bellevue. Cruz, Cabral, and the girls visited Pennington about two or three times a week. 1RP 550-51. During this time, Cabral began working

every day at a Fall City daycare facility operated by Carolyn Strange, whom she met through Pennington. 1RP 551-53, 10RP 119-21. J.C. went to school in Redmond, and Cruz used to pick her up after school and drive her to Fall City. 1RP 553-54.

Cabral, her kids, and Cruz moved in with Pennington after staying about six months in the Redmond apartment. 1RP 550, 558. They stayed with Pennington about two months. 1RP8 34-35. Then, in December 1996, they moved into Strange's Fall City home. 1RP8 34-36.

4. Allegations of sisters F.P. and A.B.[4]

F.P. recalled that Cruz lived at her mother's home with Cabral, J.C. and D.G., but said they were there for one to two years. 1RP 373-76. Over the course of time, according to F.P., Cruz touched her chest, digitally penetrated her vagina, licked her vagina, had anal intercourse, and had her touch his penis. 1RP 382-87. Activities of this type happened "[m]ultiple, multiple times." 1RP 388, 390. F.P. said she was "[s]ix, seven, eight years old" when the incidents occurred. RP1 389-90.

[4] The trial court admitted the testimony of F.P. and A.B., who were not named complainants, under RCW 10.58.090 and ER 404(b). RP1 123-29 (RCW 10.58.090), RP1 924-30 (ER 404(b)). As the result of the allegations, Cruz pleaded guilty in October 1997 to the lesser offense of communicating with a minor for immoral purposes. CP 254; 1RP 348-49.

F.P.'s sister, A.B., recalled two incidents involving Cruz. She and Cruz were sitting next to each other on a couch when Cruz reached under her skirt and touched her vagina over her underwear. 10RP 58-59. The second time, Cruz was playing with the children. He flipped A.B. over his shoulder and instead of grabbing her by the waist, he grabbed her in her crotch area. 10RP 60. Cruz told her he would hurt her if she reported the incidents, so she remained quiet for awhile. 10RP 59-61.

F.P. eventually disclosed some of the incidents to A.B., but never to her mother because of Cruz's threats to kill her and hurt her family members. RP1 388-92; 10RP 60. The girls did not disclose the abuse until February 1997, when F.P. was eight years old and A.B. was nine. 1RP 272-77, 392-93, 440, 459, 10RP 61, 12RP 64.

Detective Thompson interviewed F.P. and A.B. in February, then arrested Cruz. 1RP 278-86. Thompson and sexual assault counselor Gail Backer recounted statements made to them by both girls during the trial. 1RP 278-84 (Thompson); 1RP 492-95, 497-503, 506-27 (Backer).

5. Allegations of J.C.

J.C. said Cruz was her mother's boyfriend and lived with the family. 9RP 65. When they lived in the Redmond apartment, Cruz picked her up from school. 9RP 71-72, 90. J.C. testified Cruz used to pull her

pants down and lick her vagina. 9RP 72-73. Cruz also touched her vagina "all the time." 9RP 73-74. He also penetrated her anus with his penis "[m]any times" over the course of three years. 9RP 80-82, 106-07.

J.C. did not tell anyone about the abuse for a long time because Cruz said he would kill her and her family. She believed him, because he once held a silver gun to her head and another time ripped a phone book in half in front of the kids. 9RP 83-84, 10RP 6-7. She finally "broke down" and said "yes" in June 1997 when her "grandma" (Ms. Strange) asked her if Cruz touched her. 8RP 102-04, 110-13, 119-25; 9RP 84, 108; 10RP 132-35.

6. Allegations of sisters K.O. and B.B., and friend O.J.

Renee Beck had two daughters, K.O. and B.B. 13RP 63-64. In May 1997, at the age of 13, K.O. gave birth to twins. 13RP 67-68, 14RP 82-83.

K.O. met Cruz in September or October 1997, after she turned 14. 14 RP 83-87. K.O. lied about her age and told Cruz she was 16 when she had her twins. 14RP 91, 16RP 55, 58-59, 62. She began having sex with Cruz about two weeks after they met. 15 RP 85-86. K.O. willingly continued having sex with Cruz a few times a week into February 1998. 14RP 100-03.

K.O. brought Cruz home to meet her family in December 1997. 14RP 87-89, 100. K.O. admitted she lied to Beck when she said she met Cruz "at church." 13RP 72; 14RP 87. Cruz told Beck he was 19 years old. 13RP 71-74. Beck said she thought K.O. and Cruz "were just friends." 13RP 76. She said K.O. was "very mature" for her age and called her "a proper young lady." 14RP 47, 53.

B.B. was nine years old when K.O. gave birth. 1RP 575-76. She met Cruz through K.O., who introduced him as her boyfriend. 1RP 582-83, 614-15. Cruz eventually took her pants and underwear off and licked her vagina. 1RP 586-87. He also reached between her legs and rubbed her, both over and under her clothes. 1RP 589-90, 594-95. B.B. did not disclose these incidents because Cruz said she would get in trouble with her parents. 1RP 594.

The incidents continued into 1998. Cruz sometimes touched B.B.'s breasts. 1RP 595. One time in the hot tub in their yard, Cruz dove under the water, pushed her bathing suit aside, and licked her vagina. 1RP 595-96, 790-98. At times Cruz placed B.B.'s hand on his penis and made her rub it. RP 596-97. At least once he pushed her head down so she could put her mouth on his penis, but she resisted. RP 597-99. Another time

Cruz tried to penetrate her vagina with his penis but was not successful. 1RP 600-01, 669-677, 706-12, 722, 725-30.[5]

On February 8, 1998, Beck had a birthday party for B.B. at her home. 13RP 77-78, 14RP 103-04. One of B.B.'s friends, O.J., attended the party. She was 11 years old. 13 RP 4. Cruz was also at the party. 13RP 8-10, 78-79, 14RP 103-04. At one point, O.J. went into the basement and found herself alone with Cruz. 13RP 11-13. Cruz smelled her neck and kissed her on her mouth. 13RP 14, 22-24.

O.J. felt "[v]ery strange," but did not tell anyone at the party about the incident. 13RP 14-15. Instead, she told a school counselor or her mother a day or two later. 13RP 15-16.[6] O.J.'s mother confronted Beck with this accusation. Beck, in turn, called K.O. and notified her. 13RP

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[5] A physician who examined B.B. on May 14, 1998, testified B.B., who was 10-years-old at the time, disclosed that a man stuck his fingers inside her vagina several times and once "sprayed white stuff all over her while she was sleeping." 6RP 10-14. She denied penile/vaginal penetration. B.B. said the man told her he would beat her up if she disclosed the incident. 6RP 14.

A nurse practitioner at the Harborview Sexual Assault Center examined B.B. May 20, 1998. 11RP 6, 16. B.B. told her Cruz touched her on her "privates" atop and under her clothing. 11RP 26-27.

[6] O.J.'s counselor testified the girl told her on February 9, 1998, that Cruz put his tongue in her mouth and inappropriately touched her during a birthday party the previous weekend. 12RP 86-94. The counselor called Child Protective Services as well as O.J.'s mother. 12RP 91-92, 103-06.

15-16, 79-81, 100-01, 14RP 104-06, 16RP 21-22. K.O., who was at a store with Cruz at the time, discussed the matter with him on the way back to K.O.'s house. Neither K.O. nor her mother saw him again. 13RP 81, 14RP 62-63, 106.

B.B. recalled that at some point, Cruz stopped coming around. 1RP 604. She and K.O. denied anything had happened, but finally told their mother in May 1998 that Cruz molested them. 1RP 604-05, 13RP 82-85, 111-13, 14RP 9-10, 20, 109-10. B.B. disclosed how Cruz touched her and other things he had done to her while she was sleeping in her bedroom. 14RP 10. Specifically, B.B. alleged that Cruz put his fingers inside her vagina, "shot white stuff" over her body and face, and touched her breasts. 14RP 13. K.O. told her mother Cruz "forced himself" on her. 14RP 46, 60.

7. Courthouse rooftop incident

Five days after trial testimony began, alleged victim D.G. climbed out onto the roof of the downtown Seattle King County courthouse and threatened to commit suicide during a lunch recess. Police and negotiators responded, which caused a commotion around the courthouse. 7RP 64-66. The trial court learned that several jurors saw on their cell phones that there was an incident relating to Cruz's case at the courthouse. The court

called the jurors out and admonished them to make a special effort to shield themselves from any information about the incident. 7RP 66-68.

In response to the court's call for questions, the following exchange occurred:

> Juror: Just a comment. We knew that there was an incident at the courthouse, but we did not know it was related to this case.
>
> The Court: Okay. Yeah, well, it doesn't have any real bearing on the merits of the case, but it's certainly something that, you know, people might in some way relate to the case.

7RP 68. During this proceeding, the prosecutor and Cruz's standby counsel were on the courtroom speakerphone. 7RP 66-68. Cruz was not present. 8RP 8-9. As the jurors went home for the day, the court admonished them to refrain from speaking with anyone on the streets around the courthouse. 7RP 70.

When proceedings reconvened the following Monday, the prosecutor suggested the court question each juror individually to determine what he or she knew about the rooftop incident. 8RP 3-4. The trial court agreed. 8RP 5, 7. Cruz objected, asking how the court could even consider continuing with the same jury. He said, "I don't want to continue, your Honor, with the same jury." 8RP 7-9. Cruz moved for a

mistrial. 8RP 12. The court found the case law required it to voir dire the jurors. 8RP 9-10.

Juror 1 said she learned nothing new over the weekend, but had already known by then that "there was an issue with someone on the roof and that that's what was being held up[.]" 8RP 17-18, 20.[7]

Juror 2 said someone checked a cell phone while everyone was in the jury room and found out "there was someone on the roof, and people outside saw the tape outside and that was about it. And we all came and talked in here, and that was the first that I had heard that it could be pertaining to our case." 8RP 22-23.

Juror 3 said he had heard someone was on the roof during the previous court day, but learned nothing new over the weekend. 8RP 26-27.

Juror 4 said during the previous court day she looked out the window and saw police tape. Someone with a laptop in the jury room said "there was an incident that had occurred." 8RP 29-30. She learned nothing more about the incident over the weekend.

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[7] Only jurors 9 and 10 were specifically identified by number. 8RP 48. Counsel assigned the other jurors numbers to correspond with the order in which they were individually called into the courtroom for questioning.

Juror 5 also learned nothing from anyone outside the courthouse. When she left, she knew there was someone on top of the building. 8RP 33. The person had brown hair, was skinny, and wore jeans. 8RP 34. Juror 5 also saw yellow tape and commotion when she looked out the window. 8RP 33-34. When the judge instructed the jury to stay away from the media, she "kind of assumed it was related to our trial." 8RP 33.

Juror 6 said some of the jurors were working on a puzzle in the jury room when someone with a computer said "there was something going on outside, but it seemed irrelevant so we just went on with what we were doing." 8RP 36. She learned nothing else about the matter. 8RP 36-38.

Juror 7 knew nothing other than what he had learned in court, which was that "a person associated with the case here in this building that was on the roof that we heard threatening to jump off." 8RP 41. Juror 7 said the jurors did not know the incident was related to Cruz's case until the court told them during his admonition to avoid all media. 8RP 42, 44.

This was the first time Cruz realized the judge told the jury the incident was related to his case. He asked the judge why they were questioning the jurors when the judge himself told them the matter was case-related. 8RP 45. Cruz said it was not necessary for the court to

disclose the information. 8RP 46. The court said it told the jury the matter was related to the case in order to explain why it needed to take special care to avoid all media. 8RP 45.

Juror 9 learned nothing new over the weekend. When she left the previous court day, she knew "there was a person on the roof of the courthouse." 8RP 49, 51-53.

Juror 10 knew nothing other than what the court had told them. RP 54-57.

Juror 11 said she was looking on her Facebook account in the jury room and saw a post stating that "someone was on top of the courthouse." 8RP 60-61. She learned nothing in addition to that. 8RP 61-63.

Juror 12 she that on the previous court day, a fellow juror who had a computer announced in the jury room that "somebody wanted to jump off this building." 8RP 64, 67-68.

Juror 13 said she had learned from a friend that "somebody was on the roof" of the courthouse and the street was closed off. 8RP 70-72. The person on the roof, a woman, had long hair and wore tight jeans. 8RP 71-72.

Juror 14 was just returning to the courthouse from lunch on the day of the incident when she "saw people looking up[.]" 8RP 75-77. Once

inside the jury room, someone looking out the window noticed there was "police tape in the park[.]" 8RP 75. Then one of the jurors learned from an online news bulletin that a young, thin woman was on the roof. 8RP 75, 77. The juror did not know the incident had anything to do with Cruz's case until the judge told the jury before they left for the day. 8RP 77-78.

None of the jurors said the incident would have any bearing on how they considered Cruz's case. After hearing from all jurors, the court invited argument from the parties. Cruz reiterated his demand for a mistrial, contending it was clear the jury learned things about the incident from a computer source and the court informed the jury the incident was case-related. 8RP 81-85; CP 144-45. The prosecutor argued Cruz did not meet his burden to show the incident was "so prejudicial that nothing short of a new trial" would ensure fairness. 8RP 85-86. He maintained any inference of prejudice would be speculative. 8RP 88. The prosecutor asserted that a cautionary instruction, rather than a mistrial, was sufficient to remedy any perceived problem. 8RP 89.

The trial court agreed with the prosecutor and denied Cruz's mistrial motion. 8RP 92-93.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING CRUZ'S MOTION FOR A MISTRIAL BASED ON THE JURY'S KNOWLEDGE A WOMAN ON THE ROOF OF THE COURTHOUSE WAS RELATED TO CRUZ'S TRIAL.

A criminal defendant is guaranteed the right to a fair trial by article I, sections 3 and 22 of the Washington Constitution as well as the Sixth and Fourteenth amendments. State v. Mullin-Coston, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), aff'd., 152 Wn.2d 107 (2004). This right includes the right to an unbiased and unprejudiced jury. State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000).

"Washington, like every other State, is committed to the proposition that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial." State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds, State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). "[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it." Parnell, 77 Wn.2d at 508.

a. The "irregularity" required a mistrial.

In Cruz's case, jurors saw and/or heard something they should not have. This is best described as a "trial irregularity." See, e.g., State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (spectator misconduct in the form of a gesture simulating the pointing of a gun at a witness); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (angry outburst from defendant's mother directed to the jury and judge); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (answer to improper question), cert. denied, 479 U.S. 995 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (witness's statement that defendant had a "record").

"Trial irregularities are irregularities which occur during a criminal trial that only implicate the defendant's due process rights to a fair trial. Such irregularities neither independently violate a defendant's constitutional rights . . . nor violate a statute or rule of evidence . . . ." State v. Davenport, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984).

When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied his right to a fair trial. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). In resolving this question, this Court examines (1) the seriousness of the

irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254. The trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). An examination of the above criteria reveals such an abuse, and a resulting due process violation, in Cruz's case.

The trial irregularity was serious. By the time of its occurrence, the trial court had instructed the venire that the State charged Cruz with four counts of first degree child rape, two counts of third degree child rape, two counts of first degree child molestation, and one count of CMIP. 3RP 24, 50. The jury had heard direct and cross examination of Detective Thompson with respect to Cruz's alleged sexual abuse of F.P. and A.B., of F.P. herself, of Gail Backer, who counseled F.P. and A.B. for child sexual abuse, of a physician who examined and interviewed B.B. regarding a report of child sexual abuse, and of V.C. From that testimony, jurors learned several pre-teenage girls had accused Cruz of sexually abusing them in the mid- to late-1990s.

Among other things, Thompson had testified to the birth dates of F.P. and A.B. 1RP 276-77. F.P. was 21 years old when she took the

stand. 1RP 366. Through V.C., jurors learned J.C. was 23 at the time of trial and was a childhood friend of F.P. and A.B. 1RP 537, 546-47. Through the physician, jurors learned B.B. was 10 years old in 1998. 6RP 8-9, 12.

Jurors were thus aware that by the time of trial, the alleged victims were in their early 20s. They also knew, or at least some of them knew, that the person on the roof of the courthouse was a young woman. They also knew the police were outside the courthouse and had cordoned off the area with tape. These facts give rise to a reasonable inference that the woman was considering or had threatened suicide. Once the judge told the panel the woman was related to Cruz's trial, it was reasonable for the jurors to infer she was also an alleged victim who was scheduled to testify against Cruz, or the family member of a victim.

Following this logical and foreseeable inferential path, a reasonable juror would likely conclude the woman had reached such a state of desperation at the thought of reliving Cruz's abuse on the witness stand that she would seriously consider ending her life rather than continuing with the trial. This conclusion would, of course, be devastating to Cruz's general denial defense. For these reasons, this unusual irregularity must be considered "serious."

The incident, while not "evidence" in the usual sense, nevertheless exposed jurors to extraneous information likely to trigger a passionate, emotional, and even visceral reaction of outrage against Cruz and compassion for his accusers. Its inherently powerful effect was not cumulative to any other evidence.

Nor was it susceptible to neutralization by a curative instruction. The trial court reminded jurors their decision must be based solely on the evidence presented in the courtroom rather than things happening outside "that may be related to this case at the courthouse today." 7RP 67-68. The court also pleaded with jurors to take a "news holiday" over the forthcoming weekend and to insulate themselves from curious family members and friends. 7RP 67, 69. Before breaking, the court did not order the jury to disregard what it had heard about the rooftop incident, nor did it when court reconvened after the weekend ended.

Examination of two related cases shows the trial court abused its discretion by denying Cruz's mistrial motion. In State v. Swenson,[8] the State's visibly pregnant key witness was physically and emotionally unable to submit to continuous cross-examination that was critical to the defense.

[8] State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963), overruled on other grounds by State v. Land, 121 Wn.2d 494, 500-01 (1993).

A brief outburst by two spectators occurred in response to defense counsel's attempts to cross-examine her. 62 Wn.2d at 272-76. The accused moved for a mistrial, which the trial court denied. 62 Wn.2d at 275.

Although recognizing the importance of empowering trial courts to maintain decorum and respond to irregularities in the courtroom, the Supreme Court concluded the trial court abused its discretion by failing to grant a mistrial. 62 Wn.2d at 277, 281. The Court held the cumulative effect of the incidents violated the defendant's due process rights. 62 Wn.2d at 281. The Court cautioned reviewing courts to remain vigilant despite the forgiving abuse of discretion standard of review:

> The oft-repeated declaration of the rules reserving to the trial court broad discretionary powers to conduct a trial, preserve order and govern the order of proof, ought not be used as a refuge wherein courts of review hide from the exigencies of due process. The mere utterance of this rule of broad discretion without critical examination of the circumstances which invoke it will tend in time to erode the fundamentals of due process prescribed by the bill of rights.

62 Wn.2d at 278.

The result was different in State v. Gilcrist.[9] Gilcrist was jointly tried with a co-defendant. Their first witness requested a cup of water,

[9] State v. Gilcrist 91 Wn.2d 603, 611-12, 590 P.2d 809 (1979).

which he then threw on several jurors. In addition, as Gilcrist's counsel presented closing argument, a bomb exploded outside the courtroom. The defendants moved unsuccessfully, after each irregularity, for a mistrial. Gilcrist, 91 Wn.2d at 611-12.

The trial court reasoned that granting the mistrial motion in response to the water-tossing incident would invite future courtroom misbehavior. The court instead gave a general curative instruction. 91 Wn.2d at 612. About the bombing incident, the trial court found that, while the jurors heard the explosion, they knew neither its cause nor its source. It also occurred near the end of a lengthy trial after the presentation of all evidence. 91 Wn.2d at 612-13. The Supreme Court concluded the trial court did not abuse its discretion or violate the defendants' due process rights. 91 Wn.2d at 613.

The reasons relied on in Gilcrist do not exist in Cruz's case. Granting the motion would not have encouraged future comparable behavior. Nor would a reasonable juror – or even an unreasonable one – believe the woman on the roof was acting on Cruz's behalf. Further, a reasonable juror would likely conclude Cruz was the cause of the woman's desperation, especially after the court stated the incident was related to

Cruz's case. Finally, the incident occurred relatively early in Cruz's lengthy trial and well before the State rested its case.

An additional factor in determining whether an irregularity requires a mistrial is the timing of the court's curative instruction to disregard. In State v. Post,[10] a rape case, a detective improperly testified police became aware of Post after an individual called in and gave them Post's name, thereby expressing the caller's opinion that Post was the rapist. 118 Wn.2d at 619. After a prompt sidebar, the judge instructed jurors to disregard the detective's response. The court later denied Post's motion for mistrial. Id.

The Supreme Court affirmed, noting that both physical and eyewitness evidence linked Post with the complainant, and that the remark was isolated. Importantly, the Court also found "the judge promptly instructed the jury to disregard the response rather than letting the objected-to statement dwell in the minds of the jury." Post, 118 Wn.2d at 620.

In contrast with Post, the trial court allowed the jury in Cruz's case to dwell on the irregularity over a four-day holiday weekend. The trial court did remind the jury before it broke for the weekend that "we have to

[10] 118 Wn.2d 596, 826 P.2d 172 (1992).

decide this case based purely on the evidence produced here in court, not on anything that's going on outside of court anywhere." 7RP 67. But that was before the court told jurors the rooftop incident was related to Cruz's case. And at no point did the court instruct jurors to disregard the incident. Finally, the incident cannot be dismissed as an "isolated" one likely to be overshadowed by the other evidence.

For all of these reasons, the trial court abused its discretion by denying Cruz's motion for mistrial and proceeding with the same jury.

b. The court's denial deprived Cruz of his due process right to a fair trial.

Where a due process violation stemming from jury exposure to extraneous material is alleged, actual prejudice to the defendant need not be shown if a probability of prejudice is demonstrated. State v. Hicks, 41 Wn. App. 303, 312, 704 P.2d 1206 (1985); see State v. Stiltner, 80 Wn.2d 47, 54, 491 P.2d 1043 (1971) (regarding denial of motion for change of venue, which is also reviewed for an abuse of discretion, Court observes "a denial of due process in cases involving the publicity of criminal matters may be found even without an affirmative showing of actual prejudice. Indeed, where the circumstances involve a probability that prejudice will result, it is to be deemed inherently lacking in due process.").

The probability of prejudice is evident in Cruz's case. By the time jurors learned the rooftop incident was related to the case, they had seen Cruz exhaustively cross-examine F.P. and V.C., and had learned about allegations of sexual abuse by several child accusers. The young woman's desperate act, considered within the context of the evidence already presented, as well as opening statements, would lead a reasonable juror to believe the woman was a complainant or a relative of a complainant who could not bear the thought of reliving the trauma allegedly caused by Cruz's acts. This Court should reverse his convictions.

2. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF OTHER ALLEGED SEXUAL ACTS UNDER RCW 10.58.090 AND ER 404(B).

a. The trial court misapplied RCW 10.58.090.

Where a defendant is charged with sex offenses, a trial court may admit evidence of the commission of other sex offenses provided it first considers eight specific factors. RCW 10.58.090(6); see State v. Scherner, 153 Wn. App. 621, 658, 225 P.3d 248 (2009) ("the trial court must consider all of the factors when conducting its ER 403 balancing test."), review granted, 168 Wn.2d 1036 (2010). In Cruz's case, the trial court failed to consider "[w]hether the probative value is substantially outweighed by the danger of unfair prejudice," as required by RCW

10.58.090(6)(g). The court abused its discretion and the error was not harmless.

Evidentiary rulings under RCW 10.58.090, as well as ER 404(b), are reviewed for an abuse of discretion. State v. Williams, 156 Wn. App. 482, 492, 234 P.3d 1174, review denied, 170 Wn.2d 1011 (2010). A trial court abuses its discretion if it misapplies the law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); see State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) ("application of an incorrect legal analysis or other error of law can constitute abuse of discretion"); In re Marriage of Watson, 132 Wn. App. 222, 230, 130 P.3d 915 (2006) ("a court abuses its discretion if it fails to follow the statutory procedures").

Before trial, the State moved to admit the testimony of A.B. and F.P. under RCW 10.58.090. Supp. CP __ (sub. no. 104, Motion to Admit Testimony Under RCW 10.58 and ER 404(b), filed 7/7/2010). Subsection (1) of RCW 10.58.090 provides that where a defendant is charged with a sex offense, "evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." Cruz filed a pro se response in opposition to the State's motion, specifically citing the factors to be considered by the trial court. CP 59-64.

After reviewing the motions and hearing argument from the parties, the trial court mentioned "the factors that the Court is to look at under the statute." 1RP 127-28.[11] The court found each incident involved similar acts that occurred reasonably close in time, with reasonable frequency, and without significant intervening circumstances. 1RP 128.

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[11] RCW 10.58.090(6) provides as follows:

> When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
>
> (a) The similarity of the prior acts to the acts charged;
>
> (b) The closeness in time of the prior acts to the acts charged;
>
> (c) The frequency of the prior acts;
>
> (d) The presence or lack of intervening circumstances;
>
> (e) The necessity of the evidence beyond the testimonies already offered at trial;
>
> (f) Whether the prior act was a criminal conviction;
>
> (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
>
> (h) Other facts and circumstances.

The court also found the testimony of F.P. and A.B. was necessary despite the testimonies to be already offered at trial to prove the charged crimes. 1RP 128-29. At that point, the court concluded the testimony of F.P. and A.B. was admissible under RCW 10.58.090.

Critically, the court did not weigh the prejudice of the other acts evidence against its probative value. Because of the court's ruling, jurors heard testimony from not only F.P. and A.B., but also from Detective Thompson and sexual assault counselor Backer. 1RP 484-527. Among other things, Backer told jurors A.B. "was pretty much terrified. Her clinical measurements were extremely elevated. She said she wanted to kill herself." 1RP 496. Suicidal thoughts, Backer explained, were not typical for a nine-year-old girl. 1RP 496. F.P. told the counselor Cruz had abused her "about 99" times, which the counselor interpreted as "many more times than" the child could count. 1RP 503. The child also disclosed that Cruz anally raped her "[a]bout 18" times. 1RP 504.

The jurors also learned F.P. and A.B. were raised by an alcoholic and drug-abusing mother who died of a methadone overdose when F.P. was 16. 1RP 367-68. F.P. said her mother used to buy alcohol before buying food for the family. Calling her childhood "really, really hard," F.P. testified her mother was "there physically, but she wasn't there

mentally." 1RP 369-70. A.B. testified she followed in her mother's footsteps in her youth, living on the streets and using drugs and alcohol before turning her life around. 10RP 62-63.

The disturbing testimony relating to F.P. and A.B. was of a type likely to trigger an improper emotional response from the jury rather than a reasoned one. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.'" State v. Beadle, __ Wn.2d __, __ P.3d __, 2011 WL 5223072, *11 (2011) (quoting State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)).

That danger was realized in Cruz's case. The testimony served to "pile on" prejudicial evidence of child sexual abuse and sadness when such evidence served little probative purpose. Because there were four named victims in the charges, the evidence of alleged abuse of F.P. and A.B. was not necessary to corroborate the other victims or to place the charged crimes in clearer context. See Powell, 126 Wn.2d at 258 (regarding evidence of other acts admitted under ER 404(b), trial court must identify particular purpose for which evidence is admitted "and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged."). Nor were the alleged methods Cruz used against the

children distinctive or unusual. In sum, there was no need for the additional elaboration by either F.P. or A.B.

At the same time, the lengthy, detailed testimony of Detective Thompson added substantial credibility to the State's case. And Backer provided concrete expert evidence of the type of psychological damage Cruz's actions caused to the girls.

Had the trial court weighed the minimal probative value of the evidence against its unduly prejudicial effect, as required by RCW 10.58.090, it would likely have found the evidence inadmissible. Failing to do so was error; as our Supreme Court emphasized a long time ago, "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

The court's failure to engage in the proper weighing is nonconstitutional error. Such error requires reversal if, within reasonable probabilities, it materially affected the jury's verdicts. State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

The challenged evidence of other alleged child sexual abuse at the hands of Cruz requires reversal. The jury heard that Cruz caused a nine-

year-old-child to think about killing herself. The jury also heard that same child had an alcoholic, drug-abusing mother who cared more about getting drunk than feeding her children. The jury also heard a detailed account of the investigation from a detective whose testimony bolstered the accounts of the abuse given by F.P. and A.B. Although extremely prejudicial, the evidence had little probative value. This Court should find the error harmful and order the case remanded for a new trial.

b. The trial court also erred by admitting the evidence under ER 404(b).

During a preliminary instructions conference, the prosecutor notified the court he was considering whether to submit an instruction that addressed the "common scheme or plan" exception to admission of other acts evidence under ER 404(b).[12] 15RP 14-15. To that point, the trial court had not considered whether the testimony relating to F.P. and A.B. was admissible under ER 404(b). The prosecutor later decided to rely solely on his proposed instruction based on RCW 10.58.090. 1RP 696-97.

[12] ER 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Nevertheless, after both parties rested, the State argued the evidence regarding F.P. and A.B. was admissible under ER 404(b) to establish a common scheme or plan. 1RP 923-25. Cruz objected. 1RP 925-28. The trial court, swayed by the temporal proximity of the alleged abuse against F.P. and A.B. with the charged acts, granted the State's motion. 1RP 927-28. The court did not, however, give the jury an instruction limiting the use of the evidence under ER 404(b).

The common scheme or plan exception to ER 404(b) relates to the "doctrine of chances." State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999). It is based on the following: "The more often that unusual and abnormal elements are present in similar circumstances with similar results, the less likely it is that an innocent intent underlies the abnormal elements." Id. (citing 2 John H. Wigmore, Evidence, § 302, at 241 (1979)). "Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design." Id. While the method of the crime need not be unique, there must be substantial and marked similarities indicative of a common pattern. State v. DeVincentis, 150 Wn.2d 11, 13, 18, 20-21, 74 P.3d 119 (2003). Here, the court erred in admitting the

evidence pertaining to F.P. and A.B. because the commonalities are not complex but coincidental.

A.B. testified Cruz twice touched her vaginal area outside her underwear. 10RP 57-60. The isolated nature of these acts differs from the assertions made by F.P., J.C., B.B., or K.O., each of whom testified to repeated instances of more direct sexual abuse such as intercourse and digital penetration. F.P. testified to repeated instances of various types of sexual abuse in the garage. This location was a distinctive feature of the offenses compared with the charged crimes, which purportedly occurred within the girls' residences and at times and in places that would have easily been discoverable.

The primary similarities are the girls' ages, their accessibility to Cruz, and the roughly four-year time period in which the incidents occurred. There was no evidence, however, to establish a pattern of relevant misconduct. For example, Cruz did not engage in "grooming." The girls were not similar looking, did not have the same colored hair, did not live on the streets, did not frequent similar play areas, and did not have similar interests. Cruz did not entice the children with money or candy, did not take them to special places, and did not hit them.

Simply put, the similarities are neither complex nor "substantial and marked." Cf. DeVincentis, 150 Wn.2d at 22 (similar instances of elaborate grooming techniques, including "walking around his house in an unusual piece of clothing—bikini or g-string" and having girls "masturbate him until climax" demonstrated common scheme or plan); State v. Lough, 125 Wn.2d 847, 861, 889 P.2d 487 (1995) (evidence that defendant "rendered four other women, whom he had relationships with, unconscious with drugs and then raped them" established necessary pattern under ER 404(b)); Scherner, 153 Wn. App. at 631-32 (evidence that defendant molested two young girls during separate trips, as well as two other girls at defendant's house, admissible to show common scheme or plan in case where complainant alleged defendant abused her on a trip).

The similarities between the F.P./A.B. acts and the charged acts are far less substantial and marked. Rather than demonstrating a common design, the acts merely suggest Cruz had a propensity for sexually abusing prepubescent girls. For these reasons, the trial court abused its discretion by admitting the evidence related to F.P. and A.B. under the "common scheme or plan" exception to ER 404(b). For the reasons set forth above regarding RCW 10.58.090, the court's error was not harmless. This Court should reverse Cruz's convictions and remand for retrial.

3. THE TRIAL COURT ERRED BY GIVING A JURY INSTRUCTION PERTAINING TO RCW 10.58.090.

Instruction 7 went to the evidence of alleged sexual abuse of F.P. and A.B. that the trial court found admissible under RCW 10.59.090. However, because the instruction allowed jurors to infer the trial judge believed the girls' testimony, it was an unconstitutional comment on the evidence. Furthermore, the instruction incorrectly led jurors to believe Cruz had in fact committed "sexual assault or child molestation." These improprieties require reversal of Cruz's convictions.

a. The instruction was a comment on the evidence.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this prohibition is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

A prohibited comment is one that signals a judge's personal attitudes toward the merits of the case or invites jurors to infer from what the judge said or did not say that the judge personally believed the testimony at issue. State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). The test of error in a comment on the evidence is whether the trial

court's feeling as to the value of testimony witness has been conveyed to the jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Errors in jury instructions are reviewed de novo. Id. at 721.

Instruction 7 in Cruz's trial stated:

> In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, *evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation* is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> However, *evidence of a prior offense on its own* is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.

CP 162 (emphasis added).

Instruction 7 conveyed to jurors that the trial court believed the testimony of F.P. and A.B. This problem could have been avoided by putting the word "alleged" between "defendant's and "commission." Indeed, the trial court did just that in instructions 8 and 9, both of which

directed the jury to use certain evidence only for a limited purpose. Specifically, Instruction 8 said, "This evidence consists of threats *allegedly* made by the defendant to or witnessed by . . . ." CP 163 (emphasis added). Instructions 9 [J.C.] and 10 [B.B.] State, "This evidence consists of acts of sexual abuse *allegedly* committed by the defendant on [J.C.] [B.B.] . . . ." CP 164-65.

In this respect, Instruction 7 suffers from a flaw similar to that found to be reversible error in State v. Dewey.[13] The accused, charged with third degree rape against K.B., contended the sexual intercourse was consensual. 93 Wn. App. at 52. The trial court granted the State's motion to present evidence from an earlier rape case involving the accused and A.N.R. for the limited purposes of determining whether the sex with K.B. was consensual and whether it was part of a common scheme or plan. Id. at 53.

Just before A.N.R. took the stand, the trial judge used a defense instruction to direct the jury that it could consider the *incident* only for those two limited purposes. But when the court instructed jurors at the

[13] State v. Dewey 93 Wn. App. 50, 966 P.2d 414 (1998), abrogated on other grounds by DeVincentis, 150 Wn.2d at 21.

conclusion of the evidence, it used the State's limiting instruction, which referred to the A.N.R. *incident* as a *rape*. 93 Wn. App. at 54.

After being convicted, the defendant appealed, contending the concluding instruction was a comment on the evidence. The Court of Appeals agreed, holding that "[t]he 'incident' would only become a 'rape' if A.N.R.'s testimony were believed." 93 Wn. App. at 59. Therefore, the instruction permitted the jury to infer that the trial court believed A.N.R.'s testimony was true. Id. See also State v. Eaker, 113 Wn. App. 111, 118-19, 53 P.3d 37 (2002) (reversal required because instruction in first degree child rape case impermissibly commented on the evidence by assuming woman babysat child and took him to home on day that fell within specific range of dates), review denied, 149 Wn.2d 1003 (2003).[14]

The same reasoning applies to Instruction 7 in Cruz's case. By failing to include the word "alleged," the trial court conveyed its belief that

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[14] Instruction 5 stated that in order to convict, jury had to find:

> That on or between the 1st day of January, 1990 and the 31st day of December, 1991, the defendant had sexual intercourse with [M.F.] while [M.F.'s] parents were on vacation on the day that Judy Russel was babysitting [M.F.] and took him to his house at 1325 Isaacs Street, Walla Walla[.]

Eaker, 113 Wn. App. at 118.

F.P. and A.B. were truthful and that Cruz committed "another offense or offenses of sexual assault or child molestation." CP 162. This was an unconstitutional comment on the evidence.

b. Instruction 7 misled the jury to Cruz's detriment.

The trial court also affirmatively misled jurors by referring to the acts against F.P. and A.B. as "sexual assault or child molestation." A misleading jury instruction can deprive an accused of the due process right to a fair trial. See State v. Aguirre, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010) (jury instructions, read as a whole, suffice when they permit counsel to argue their case theories, are not misleading, and properly inform the jury of the applicable law.).

In Cruz's case, jurors heard lengthy, detailed testimony indicating Cruz raped F.P. and molested A.B. The State had in fact charged Cruz with first degree child rape and first degree child molestation. Supp. CP __ (sub. no. 104), at 7. But Cruz pleaded guilty to a lesser charge, CMIP, in October 1997. Id. at 7. Importantly, however, the jury never heard this fact. CP 254; 1RP 347-48.

CMIP requires neither physical contact nor a threat. RCW 9.68A.090; see State v. Hosier, 157 Wn.2d 1, 11-12, 133 P.3d 936 (2006) (writing notes and displaying them at place and in manner likely to attract

attention of minors "with the requisite 'predatory purpose' of promoting a minor's exposure and involvement in 'sexual misconduct'" enough to support conviction for CMIP). But Instruction 7 allowed jurors to conclude Cruz committed "sexual assault or child molestation." CP 162. The misleading nature of this portion of the instruction also renders it improper and deprived Cruz of his constitutional rights to due process and a fair jury trial.

c. The court's impermissible use of Instruction 7 requires reversal.

"A judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). The State cannot meet its burden here.

Cruz's defense was general denial. Witness credibility was critical to the outcome of the case. Cruz vigorously sought to impeach the complaining witnesses with inconsistent statements to the police and to original trial counsel. By signaling its belief in the testimony of F.P. and A.B., the trial court undermined Cruz's defense strategy and implicitly bolstered the testimony of the named victims as well.

Further, the jury was instructed it could consider the evidence "for its bearing on any matter to which it is relevant." CP 162. And the jury did not receive a limiting instruction under ER 404(b) regarding the evidence relating to F.P. and A.B. As a result, the jury could have used the evidence to conclude Cruz had a propensity to sexually abuse young girls. Such a conclusion would have been devastating to Cruz's chances at trial. For these reasons, Instruction 7 prejudiced Cruz's rights to a fair jury trial. This Court should reverse his convictions.

4. RCW 10.58.090 IS AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS DOCTRINE BECAUSE IT IS IN DIRECT CONFLICT WITH ER 404(B).

The separation of powers doctrine flows from the three-part structure of government under the Washington Constitution. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994); Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary). In that structure, no branch of government may invade or usurp powers constitutionally assigned to another branch. State v. Moreno, 147 Wn.2d. 500, 505-06, 58 P.3d 265 (2002).

Statutes are presumed constitutional but may be struck down when shown to be unconstitutional beyond a reasonable doubt. Ludvigsen v. City of Seattle, 162 Wn.2d 660, 668, 174 P.3d 43 (2007). A challenge to a

statute as violating separation of powers principles may be made for the first time on appeal. State v. Ramos, 149 Wn. App. 266, 270 n.2, 202 P.3d 383 (2009). Courts review the constitutionality of a statute de novo. Ludvigsen, 162 Wn.2d at 668.

The Legislature and the courts may both prescribe rules of evidence. When the two irreconcilably conflict, however, court rules trump in procedural matters. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Substantive law "'prescribes norms for societal conduct and punishments for violations thereof.'" Id. (quoting State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)). By contrast, practice and procedure relates to the "essentially mechanical operations of the courts" by which substantive law is effectuated. Id.

RCW 10.58.090 is within the courts' purview as procedural, rather than substantive. This Court is not necessarily bound by the Legislature's characterization of the statute as substantive. See Laws 2008, ch. 90, §1; In re Personal Restraint of Smith, 139 Wn.2d 199, 208, 986 P.2d 131 (1999). RCW 10.58.090 does not prescribe societal norms or punishments. Instead, it alters the mechanism by which those norms and punishments are determined by allowing admission of otherwise inadmissible evidence for the otherwise impermissible purpose of inferring

guilt based on criminal propensity or character. RCW 10.58.090. It is therefore procedural, rather than substantive in nature and is within the courts' ultimate purview. See Jensen, 158 Wn.2d at 394.

By its terms, RCW 10.58.090 conflicts with ER 404(b). Under ER 404(b), evidence of other wrongs cannot be used to infer action in conformity on a particular occasion. It cannot be used merely to infer a criminal character, propensity, or disposition. By contrast, RCW 10.58.090 permits the use of prior sex offenses "notwithstanding Evidence Rule 404(b)." Nothing in the statute limits the admission of this in any way. It therefore permits evidence of other, uncharged bad acts for the inference of bad character forbidden by ER 404(b). Because RCW 10.58.090 is procedural and cannot be reconciled with ER 404(b), it is void as a violation of separation of powers. See State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) ("Legislation which violates the separation of power doctrine is void.")

5. IF RCW 10.58.090 IS SUBSTANTIVE, RATHER THAN PROCEDURAL, IT VIOLATES CONSTITUTIONAL PROTECTIONS AGAINST EX POST FACTO LEGISLATION.

A law violates the ex post facto clause when it: "(1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person

affected by it.'" State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (quoting In re Personal Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)). RCW 10.58.090 operates retroactively: "Section 2 of this act applies to any case that is tried on or after its adoption." Laws of 2008, ch. 90, § 3. It therefore applied against those whose offenses, like Cruz's, were committed long before the 2008 enactment. It can hardly be argued that RCW 10.58.090 does not disadvantage those accused of sex offenses by allowing courts and juries to consider all prior accusations, whether proven or not, as evidence of a disposition to commit such crimes.

The question is largely whether the statute is substantive or merely procedural. The legislative notes following RCW 10.58.090 state that, as an evidentiary rule, the statute is substantive, rather than procedural, in nature. Laws of 2008, ch. 90, §1 (citing State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929). If this Court agrees, RCW 10.58.090 violates ex post facto principles.

The ex post facto clauses of the State and federal constitutions[15] prohibit as substantive, legislation that alters the rules of evidence to

[15] The Washington Constitution provides, "No . . . ex post facto law . . . shall ever be passed." Const. art. I, § 23. The United States Constitution provides, "No State shall . . . pass any . . . ex post facto law." U.S. Const. art. I, § 10.

permit conviction based on less evidence than the law required at the time of the offense. Ludvigsen, 162 Wn.2d at 668-72. The difference between ordinary changes to rules of evidence and changes that violate ex post facto lies in their "impact on the sufficiency of evidence necessary to convict." Id. at 671. "Ordinary rules of evidence are procedural and neutral." Id. Such ordinary rule changes do not implicate ex post facto concerns because even if the State may occasionally benefit from them, they "are not inherently beneficial to the State." Id. RCW 10.58.090 is plainly not an ordinary rule of evidence; it dramatically favors the State.

At the time of the offenses in this case, evidence of other crimes or acts was governed by ER 404(b). Such were not admissible to show "action in conformity therewith," but could be used to prove other propositions such as identity, knowledge, motive, a common scheme or plan, opportunity, or lack of mistake. ER 404(b); Laws of 2008, ch. 90, § 1.

Evidence of earlier crimes could generally be admitted, so long as the forbidden inference of "once a criminal, always a criminal," was avoided. Burkins, 94 Wn. App. at 690. This was a fundamental principle of longstanding Washington law. See State v. Bokien, 14 Wash. 403, 414, 44 P. 889 (1896) ("it is not competent to show the commission of another

distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged").

RCW 10.58.090 constitutes a sea change in the use of evidence of other crimes in sex offenses cases. The statute declared that henceforth evidence of other sex crimes was admissible without any of the restrictions previously placed on such evidence by ER 404(b). In other words, the evidence was now admissible for any purpose, including the forbidden "once a criminal, always a criminal" inference. RCW 10.58.090; accord Schroeder v. Tilton, 493 F.3d 1083, 1087 (9th Cir. 2007) (nearly identical section 1108 of California evidence code permits evidence of prior sexual misconduct to demonstrate propensity to commit the crime charged so long as prejudice does not substantially outweigh probative value).

Before RCW 10.58.090, the State would have had to present sufficient evidence relating to the circumstances of the charged offenses to prove guilt beyond a reasonable doubt. See Bokien, 14 Wash. at 414. Now, any gaps in that proof could be filled with proof of other unrelated sex offenses. By permitting such gap-filling, RCW 10.58.090 effectively reduces the State's burden as to the charged offenses. Application of the 2008 law to the offenses in this case, committed between 1993 and 1998

violates the ex post facto clauses of both our State and federal constitutions and requires reversal of Cruz's convictions.

6. RCW 10.58.090 ALSO VIOLATES THE GREATER PROTECTION OF WASHINGTON'S EX POST FACTO CLAUSE.

When determining whether the Washington Constitution provides greater protection than the federal constitution, courts consider six non-exclusive factors: the textual language of the State constitution; significant differences in the texts of parallel provisions of the federal and State constitutions; State constitutional and common law history; preexisting State law; differences in structure between the federal and State constitutions; and whether the matter is of particular State interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Each of those factors indicates Washington's ex post facto clause provides broader protection than the federal constitution.

First, the textual language is slightly different. Article I, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution provides: "[N]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23. These textual differences are

significant because the framers understood Washington's ex post facto clause as prohibiting retroactive legislation that favored the State over criminal defendants.

In 1798, the federal ex post facto clause was interpreted as prohibiting, among other categories of laws, "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91, 1 L. Ed. 648 (1798). Despite Calder's clear language regarding changes in the rules of evidence to receive "different" testimony, since then the Supreme Court has concluded ordinary rules of evidence do not implicate ex post facto concerns because they are generally evenhanded. Carmell v. Texas, 529 U.S. 513, 533 n.23, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (1999).

But at the time Washington's constitution was adopted, the ex post facto clause was interpreted as barring changes in the rules of evidence that favor one side over the other. See Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S. Ct. 922, 43 L. Ed. 204 (1898) (no ex post facto violation because the change "placed the State and the accused upon an equality").

Oregon recently concluded its constitution incorporates this greater protection for defendants against changes in the rules of evidence that favor the State in a one-sided manner. State v. Fugate, 332 Or. 195, 213-14, 26 P.3d 802, 813 (2001). Washington's Ex Post Facto clause was modeled largely on the Oregon Constitution. R. Utter and H. Spitzer, The Washington State Constitution, A Reference Guide, 9 (2002). By adopting the different language of the Oregon Constitution, the framers of Washington's constitution indicated that the ex post facto clause was intended to be more protective than the federal provision. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (decision to use other states' constitutional language indicates the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution).

Two years after Washington became a state, the Supreme Court cited to Calder as providing "a comprehensive and correct definition of what constitutes an ex post facto law." Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891). The Lybarger court concluded the statute at issue did not violate ex post facto provisions, in part, because "[i]t does not change the rules of evidence to make conviction more easy." 2 Wash. at 560.

Greater protection is also warranted because regulation of criminal trials is a matter of particular state concern. State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004). Like Oregon's constitution upon which it was modeled, Washington's ex post facto clause should be held to provide greater protection than the federal provision. Changes in the rules of evidence that clearly favor the prosecution, such as RCW 10.58.090, violate that protection.

7. PERMITTING JURIES AND COURTS TO RELY ON CRIMINAL PROPENSITY OR CHARACTER TO SHOW GUILT VIOLATES THE DUE PROCESS RIGHT TO A FAIR TRIAL.

The common law rule against propensity evidence has existed at least since 1684. McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir. 1993). Since that time, courts have routinely considered the right to be tried only on the charged offenses as a fundamental component of the due process right to a fair trial. See, e.g., United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) ("[I]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'") (quoting United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978)). Thus, the general ban on finding defendants guilty based on criminal propensity, character, or disposition existed before either the Washington or federal constitutions.

Washington's constitutional right to a jury trial "preserves the right as it existed at common law in the territory at the time of [our constitution's] adoption." City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)). At the time of adoption, a fair trial was understood as one in which an accused person was tried only for the charged offenses, and not on his bad character or disposition to commit crimes. See McKinney, 993 F.2d at 1381; Foskey, 636 F.2d at 523. RCW 10.58.090 violates the due process right to a fair trial because it opens the floodgates to evidence of other uncharged wrongs in sex offense cases, and permits courts and juries to rely on the traditionally forbidden inference of bad character or criminal propensity. RCW 10.58.090 therefore violates article I, section 21 of Washington's constitution guaranteeing that the right to a fair trial shall remain inviolate.

8. THE TRIAL COURT ERRED IN ADMITTING CHILD HEARSAY WITHOUT PROPERLY WEIGHING THE RYAN FACTORS.

A child's hearsay accusations of abuse are generally inadmissible unless they meet one of the established exceptions such as "excited utterance" or a statement made for the purpose of medical diagnosis. In re Dependency of A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998). The Legislature, however, significantly expanded this rule when it enacted

RCW 9A.44.120. Under this provision, the out-of-court statements of a child who testifies at trial are admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1).

In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Washington Supreme Court set forth a number of factors for determining the admissibility of a child's statements under RCW 9A.44.120:

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained assertions about past fact; (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement; (8) how likely is it that the statement was founded on faulty recollection; and (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-76. Although each factor need not favor admission of child hearsay, the factors as a whole must be substantially met before admission will be affirmed on appeal. State v. Swan, 114 Wn.2d 613, 652, 790 P. 2d 610 (1990).

A court's decision to admit child hearsay statements is reversible when the court abuses its discretion in weighing the Ryan factors. State v.

Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995).

The court abused its discretion in Cruz's case because it did not properly apply each Ryan factor or find that each was substantially met. The court did not enter written findings. In its oral ruling, the judge mentioned three of the nine Ryan factors (no motive to lie, more than one person heard statements, general character to tell truth). 4RP 91-93. And the court made a passing reference to the spontaneity factor, observing that "the information conveyed was accurate in that the questions asked were nonleading questions." 4RP 93.

The court disregarded some the Ryan factors in determining the admissibility of statements made by F.P., A.B., and J.C. The court thus abused its discretion because in failing to properly apply the factors, it failed to apply the appropriate standard of law.

a. The court failed to consider each Ryan factors and failed to find each was substantially satisfied.

Appellate courts have often upheld trial courts' discretion to admit child hearsay under the Ryan factors. However, in those cases, the lower courts considered and applied the Ryan factors and found they were substantially satisfied, even if every single factor did not weigh in favor of admissibility.

A valid exercise of the court's discretion to determine admissibility under Ryan requires, at a minimum, consideration of each of the Ryan factors. For example, in Swan the trial court's rulings "demonstrated careful consideration of the Ryan factors." Swan, 114 Wn.2d at 648. In State v. Grogan,[16] "the trial court made specific findings on each Ryan factor" and "orally considered each Ryan factor. Grogan, 147 Wn. App. at 515, 521. In State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), the trial court "considered each of the Ryan factors in turn" and determined the statements were reliable. Borboa, 157 Wn.2d at 122. In State v. Swanson,[17] the court considered each Ryan factor in its memorandum decision. Swanson, 62 Wn. App. at 193.

Additionally, courts have been found to have validly exercised discretion under Ryan when, although the court may not have expressly found every factor, it expressly found that the Ryan factors substantially weighed in favor of reliability and admissibility. In State v. Keneally,[18]

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[16] 147 Wn. App. 511, 195 P.3d 1017 (2008), review granted, remanded for reconsideration on other grounds, 168 Wn.2d 1039 (2010).

[17] 62 Wn. App. 186, 813 P.2d 614, review denied, 118 Wn.2d 1002 (1991).

[18] 151 Wn. App. 861, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012 (2010).

the defendant argued that the trial court did not explicitly mention each Ryan factor. The Court of Appeals rejected this argument because the trial court "expressly stated that the Ryan factors were met." Keneally, 151 Wn. App. at 880. Similarly, in State v. Quigg, 72 Wn. App. 828, 835, 866 P.2d 655 (1994), the defendant argued the court had ignored the Ryan factors. However, on appeal, the court noted that the trial court had expressly found five of the nine factors were satisfied and weighed them on the record. Quigg, 72 Wn. App. at 835-36.

In contrast to each of these cases, the trial court here at best discussed four of the nine Ryan factors, with only a passing, indirect reference to the spontaneity factor. And by observing that most of the questions, at least to F.P. and A.B., were "nonleading," the court apparently did not consider Backer's testimony that she purposefully progressed from "very open questions to specific questions." 4RP 14-15.

Backer also initiated certain topics the girls did not bring up, such as by asking whether F.P.'s clothes were on or off when Cruz touched her, whether it hurt or felt good, whether Cruz ever had F.P. touch him, whether Cruz ever did "anything different," and whether F.P. ever saw "anything come out of his private." 4RP 19-20. And with respect to A.B.,

Backer said she "asked her to tell me about the first time something happened to her." 4RP 24.

Furthermore, the trial court did not expressly balance those factors favoring admission against those favoring exclusion. Nor did the court discuss other circumstances that might affect reliability, such as whether the children may have talked with each other about the allegations and been influenced by each other, as the court relied on in State v. Woods, 154 Wn.2d 613, 625, 114 P.3d 1174 (2005). Indeed, through Detective Thompson the trial court learned F.P. told A.B. what Cruz had done to her. 4RP 56, 58, 62-63, 78.

b. The court failed to consider several of the essential Ryan factors.

Importantly, the court skipped over factors crucial to determining reliability. The court did not consider the timing of the initial disclosures by F.P. and A.B. to their mother's then-boyfriend, Peloquin, or how Peloquin's relationship to the girls' mother may have caused the girls to reinforce the initial disclosures with similar explanations to other witnesses. 4RP 24, 51, 59, 78. See Ryan, 103 Wn.2d at 176 (court found hearsay statements unreliable in part because children's initial statements "were made to one person, although subsequent repetitions were heard by others.").

Nor did the court make any finding with respect to the girls' faulty recollection. The possibility of faulty recollection or tainted memory, for example, makes it possible for a child to believe he or she is telling the truth, while in fact relating a false memory. Cf. A.E.P., 135 Wn.2d at 230-31 (possibility child's memory is corrupted or tainted by suggestive interviewing relevant to fifth, eighth, and ninth Ryan factors).

c. The court abused its discretion and a new trial is called for.

The court's failure to consider each of the Ryan factors and to make a finding that the factors substantially weighed in favor of admissibility was an abuse of discretion that requires a new trial. An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial. State v. Bashaw, 169 Wn.2d 133, 143, 234 P.3d 195 (2010); State v. Jenkins, 53 Wn. App. 228, 231, 766 P.2d 499, review denied, 112 Wn.2d 1016 (1989). For reasons already set forth, evidence that Cruz sexually assaulted F.P. and A.B. during a similar time period as the charged offenses was devastating to his defense. The hearsay evidence was thus far from trivial or minor. Erroneous admission of this testimony prejudiced Cruz and requires a new trial.

9. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY ORDERING A $100 DNA COLLECTION FEE.

The trial court ordered Cruz to pay a $100 DNA collection fee under RCW 43.43.7541. CP 247. The court had no authority to order the fee. This Court should order the fee stricken.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal, including unlawful community custody conditions. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing to challenge sentencing conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague community custody condition).

The law in effect at the time of the offense controls the sentence. State v. Acevedo, 159 Wn. App. 221, 231-32, 248 P.3d 526 (2010). In

Cruz's case, the trial court imposed a $100 DNA fee for offenses committed well before the effective date of the fee. CP 247. The latest date for any of the charging periods alleged by the State was March 1, 1998. CP 146-152. RCW 43.43.7541 imposes the DNA fee only for felonies committed on or after July 1, 2002. State v. Brockob, 159 Wn.2d 311, 349, 150 P.3d 59 (2006). As the Brockob Court did, this Court should remand with instructions to strike the $100 DNA collection fee from Cruz's judgment and sentence.

10. THE TRIAL COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY BY IMPOSING A COMMUNITY CUSTODY CONDITION THAT WAS NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE.

As a "crime-related prohibition[]" of community custody, the trial court ordered Cruz to "submit to random searches of his person, residence, or computer by the Dept. of Corrections." CP 257. The trial court exceeded its statutory sentencing authority because this condition was not crime-related.

Under the law in effect at the time of Cruz's offenses, a trial court was authorized to order offenders to "comply with any crime-related prohibitions." Former RCW 9.94A.120 (9)(c)(v) (1998). By "crime-related prohibition," the Legislature meant

> an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Former RCW 9.94A.030(11) (1998).

Preliminarily, the "random search" condition does not meet this definition of a "crime-related prohibition" because it does not prohibit conduct. Instead, the court ordered Cruz to do something, i.e., "be required to submit to random searches . . . ." CP 257.

Regardless, the court's order is not crime-related. There was no evidence Cruz viewed or collected internet pornography or, for that matter, used a computer at all. Nor was there evidence Cruz collected children's underwear, clothing, photographs, books, or magazines relating to sex with little girls that could be discovered by a "random search" of his person or residence. While the court's "random search" condition may have been related to a child-pornography possession or production crime, or to an offender who used child pornography before engaging in child sexual abuse, it did not relate to Cruz or to his crimes.

Because the trial court had no statutory authority to impose the search condition, Cruz may challenge it for the first time on appeal. Jones,

118 Wn. App. at 204. This Court should remand with instructions to strike the "random search" condition.

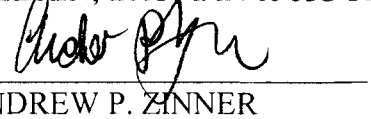
D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial on all counts. In the event this court declines to do so, then Cruz's sentence should be remanded for vacation of the DNA collection fee and "random search" community custody condition.

DATED this 28 day of December, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66709-2-I
	)	
SALVADOR CRUZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SALVADOR CRUZ
DOC NO. 769590
WASHING CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF DECEMBER 2011.

x Patrick Mayovsky